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In the Supreme Court of the United States

OCTOBER TERM, 1955

DANTAN GEORGE REA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 14–19) is reported at 218 F. 2d 237. The opinion of the District Court (R. 8) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1954 (R. 19). The petition for a writ of certiorari was filed on January 19, 1955, and was granted on March 7, 1955 (R. 20). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a federal court should enjoin federal officers from turning over to a state, and from testifying in a state criminal proceeding regarding, evidence which had been seized under an invalid federal search warrant and had been suppressed in the federal court.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Federal Rules of Criminal Procedure provide in pertinent part:

> RULE 1.-SCOPE.
>
> These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.
>
> RULE 41. SEARCH AND SEIZURE.
>
> * * * * *
>
> (e) *Motion for Return of Property and to Suppress Evidence.*
>
> A person aggrieved by an unlawful search and seizure may move the district

court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

On September 12, 1953, an indictment charging the unlawful acquisition of marihuana in violation of 26 U. S. C. 2593 (a) was returned against petitioner in the United States District Court for New Mexico (R. 2). Petitioner subsequently moved to suppress as evidence marihuana and

other property taken from his home by federal narcotics agent Salter, on the ground that the warrant on which the search was based was invalid[1] (R. 3–4). The motion sought to have the property "suppressed as evidence against him in any criminal proceeding", including the proceeding in which the motion was filed (R. 3–4). On June 18, 1954, the District Court granted the motion to suppress, and, on the Government's motion, dismissed the indictment (R. 4).[2]

Thereafter, on the basis of a complaint filed by federal narcotics agent Salter, a warrant of arrest was issued against petitioner by a New Mexico court charging him with possession of marihuana in violation of state law. Petitioner was arrested and held for trial in the state court on this charge. (R. 7.)

Alleging that the evidence which had been suppressed in the federal court formed the basis of the state charge, petitioner, on June 21, 1954, sought in the United States District Court an order holding Salter in contempt for violation of the order of suppression and enjoining him and other agents of the United States from transferring the seized evidence to state authorities or testifying with respect thereto in the state courts

[1] Petitioner's motion alleged that (a) the warrant was insufficient on its face, (b) no probable cause existed, and (c) the affidavit was based on unsworn statements (R. 3–4).

[2] The motion did not seek the return of the marihuana. Since it was contraband, it was not returned.

(R. 5–7). The District Court denied the motion, holding that (R. 8):

> * * * suppression of evidence in a Federal Court, under Rule 41 of the Federal Rules of Criminal Procedure, and the Fourth Amendment to the Constitution of the United States, applies only to proceedings in a United States District Court, and does not govern the use of that evidence in a State Court.

On appeal, the Court of Appeals affirmed the order (R. 19).

SUMMARY OF ARGUMENT

In seeking to enjoin a federal narcotics agent from turning narcotics over to a state and testifying in a state court, petitioner asks the federal court to preclude the use of evidence in a state prosecution for a state offense. Such a result would (1) extend the federal rule of suppression, which has heretofore operated as a rule of evidence only for federal trials, and (2) effectively qualify the holding in *Wolf* v. *Colorado*, 338 U. S. 25, 33, "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." The considerations for and against the suppression in state trials of evidence illegally procured by federal officers are closely balanced. A decision for suppression will have direct impact upon

state rather than federal prosecutions. If such a decision is to be made, it should follow, not precede, the state's opportunity to consider and defend its judgment on this matter of state concern. There is no sufficient showing of need or justification for tying the state's hands in advance in this proceeding to which the state is not even a party.

I

Under the decisions of this Court, the suppression of evidence illegally seized has applied, as a rule of evidence, only for federal proceedings. It would be an extension to apply it, even indirectly, to state court trials.

A. The rule of suppression is a federal judicial principle for implementing the Fourth Amendment. It is not inescapably required by that Amendment; even more clearly, it is not imposed upon the states by the Fourteenth. *Wolf* v. *Colorado, supra; Irvine* v. *California*, 347 U. S. 128.

B. Rule 41 (e) of the Federal Rules of Criminal Procedure neither requires nor authorizes the suppression petitioner seeks. Like all the Rules of which it is part, 41 (e) applies only to the federal courts and federal proceedings. Rule 1. Cf. *Schwartz* v. *Texas*, 344 U. S. 199, 203.

While we dispute the asserted basis in Rule 41 (e), we agree with petitioner that there is jurisdiction to grant the relief he seeks. The claim is violation of a federal constitutional right

by a federal officer acting under a federal warrant. These circumstances seem sufficient to invoke the federal court's equitable jurisdiction. Cf. *Bell* v. *Hood*, 327 U. S. 678, 684. Accordingly, conceding federal judicial power to order suppression, our arguments against this result are considerations of policy. *Stefanelli* v. *Minard*, 342 U. S. 117, 120.

C. The decided cases have so far defined the federal doctrine of suppression as a rule of evidence governing only federal proceedings. Even in such proceedings, the rule has stopped well short of the limits abstract logic might support. The rule may be invoked only by one whose constitutional rights have been invaded, not by anyone harmed by the admission of evidence illegally obtained. *Agnello* v. *United States*, 269 U. S. 20, 35. It may not be employed to exclude evidence which demonstrates a defendant's perjury in the trial. *Walder* v. *United States*, 347 U. S. 62, 65. And it does not render inadmissible in a federal court evidence unlawfully seized by a state officer. *Weeks* v. *United States*, 232 U. S. 383, 398; *Irvine* v. *California*, 347 U. S. 128, 136.

In addition to these limitations in the federal courts themselves, it is, of course, important here that the states have not been required to adopt the rule of suppression. *Wolf* v. *Colorado*, *supra*. The confinement of the doctrine as a strictly federal rule of evidence reflects a recognition that

most Anglo-American courts, sharing the prohibition against unreasonable searches and seizures, have rejected suppression of illegally seized evidence as an appropriate means of enforcement. *Id.* at 28–29. The fact that this is a matter within "an allowable range of judgment on issues not susceptible of quantitative solution" (*id.* at 28) in itself argues against the extension for which petitioner contends. On the other hand, the new problem here relates to evidence illegally seized by a federal officer under a federal warrant—factors which favor suppression of the evidence even in a state trial.

II

The substantive issue, which is a close one, is of primary concern to the states. Whatever the ultimate answer is to be, the critical problem is whether the federal court should reach out now and control the state's proceedings before the state has made its determination. In our view, this action is premature; the issue should be remitted to the state proceeding.

A. If petitioner is correct in arguing that the state court must exclude the evidence in question, there is no need or justification for federal intervention at this point. Due regard for the states and for the principle that equity will not ordinarily enjoin a criminal prosecution would combine to stay the hand of the federal court.

Douglas v. *City of Jeannette*, 319 U. S. 157, 163; *Watson* v. *Buck*, 313 U. S. 387, 400.

B. If the state is free to receive the evidence, the federal court should not prevent it from doing so. Though it concerned state rather than federal officers, *Stefanelli* v. *Minard*, 342 U. S. 117, 122, controls here with its holding "that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure."

On the assumption that the state may use the evidence, suppression in this case would make for capricious results. Exclusion would then depend on whether the evidence had been turned over to the state before federal intervention was sought. Rules implementing the rights of privacy should not predicate their consequences upon unseemly races to and between state and federal courthouses. If the states are to be denied such evidence, its use should invalidate state convictions. And for this ultimate result, if it is to be reached, federal intervention in advance is unnecessary and unjustified.

C. The propriety of federal action now cannot be determined simply by projecting possible conclusions as to the state's power to use the evidence involved. For the fact is that this ultimate question may itself be affected by the state's action which petitioner seeks to foreclose. The nature of the search in this case—where there

was a warrant, though it was held insufficient under federal law—is a matter the state should be free in the first instance to explore for itself. Considerations of state policy, still undeveloped in this case on its undeveloped facts, are important. The state may exclude the evidence, adopting the *Weeks* rule or some variant of it as applicable to federal searches. And if the state chooses to employ the evidence, its reasons for doing so are entitled to be heard and weighed.

ARGUMENT

Introduction

The difficult question this case presents is of primary concern to the State of New Mexico rather than the Federal Government. The purpose of the instant proceeding is to have the federal court suppress evidence to prevent its use in a state prosecution for a state offense. Before the present motion was made, petitioner had already obtained an order suppressing the use of the evidence in federal proceedings, and that ruling, from which the Government could not appeal, must be accepted as binding on the federal courts. There is no claim, and there could be none, that petitioner was entitled to the return of the contraband narcotics.[3] Moreover, even if the

[3] Since the marihuana was contraband, Act of August 9, 1939, c. 618, 53 Stat. 1291, 49 U. S. C. 781, petitioner was not entitled to the return thereof under Rule 41 (e), F. R. Crim. P.

property were the kind that could have been returned to petitioner, he would not thereby have obtained the relief which he seeks. It may be that, if the property had been returned, considerations of self-incrimination (not the Fourth Amendment) would have prevented the state from subpoenaing the evidence. But petitioner attempts to bar, not only the physical transfer of the property, but oral testimony of the federal officer as to the circumstances under which the narcotics were found.

Thus, petitioner seeks the suppression of evidence before a state court and not the mere equivalent of the return of property. The essential question now before this Court, therefore, is whether the State of New Mexico should be barred by the federal courts from determining for itself whether the evidence should be admitted in a state prosecution for a state offense because it was a federal officer who conducted the search, and whether that decision should be made by the federal courts before the state has had an opportunity to pass upon the question. Phrased otherwise, the issue is whether the federal rule of suppression extends so far as to bar federal officers from testifying in a state prosecution for a state offense even though in so doing they would act merely as witnesses in the state proceeding.

The solution to this problem depends, in large part, on the concepts which are deemed to control in defining the federal rule of suppression.

The answers may vary depending on whether the rule is regarded primarily as (1) necessarily inherent in the Fourth Amendment, (2) a vindication by the federal courts of the Fourth Amendment rights of any individual before them as against illegal executive action, or (3) a rule of evidence in federal proceedings. As we read the decisions of this Court, the rule of suppression is a federal rule of evidence, created under the power of the federal courts to determine what evidence should be received, and extending only to federal proceedings. It is not a rule inescapably imbedded in the Fourth Amendment. It is a vindication of the personal rights of the individual or a penalty for illegal executive action only to the extent that the courts, in shaping their rules of evidence, choose not to accept evidence they regard as tainted by illegal executive action. It is not and cannot be a general disciplinary measure against executive officers. As a federal rule of evidence, it extends only to federal proceedings and has not been used to dictate to the states what evidence they may or may not use in a state criminal prosecution for a state crime.

It follows that the ultimate result petitioner seeks—suppression of such evidence in the state court trial—would entail a significant extension of the rule and a qualification of the holding in *Wolf* v. *Colorado*, 338 U. S. 25, 33, "that in a prosecution in a State court for a State crime the

Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." The arguments for and against such an ultimate result are closely balanced. If the step is to be taken—if the states are to be denied the use of evidence like that in this case—we think such a rule should apply squarely and forthrightly to the states, upon which it will operate. This is to say that acceptance of petitioner's view on the merits of the problem of state use of the evidence should be effective to invalidate (on direct review) a state conviction based upon the disputed evidence. There would be, therefore, no need or justification for the federal district court to reach out now and preclude the state in advance from receiving this evidence. It is, we suggest, an unsatisfactory alternative to hold that petitioner's motion to suppress should be granted but that, had the state obtained the evidence and used it for conviction before the motion was made in the federal court, the conviction would not be reversed as violative of the Fourteenth Amendment. Such a conclusion would leave the rights of privacy to vary fortuitously with procedural and chronological distinctions which should make no constitutional difference.

On the foregoing premises, we urge that petitioner's complaint is premature. In the discussion which follows we show that action by a fed-

eral court to prevent a state's use of the evidence in question would go beyond the precedents defining the federal rule of suppression, which has been confined to controlling federal prosecutions in federal courts, and, even within these limits, has been restricted to less than the scope abstract logic might support. There is doubt whether this rule, which this Court has acknowledged to reflect a minority view in Anglo-American courts, should be broadened directly or indirectly to reach the type of state prosecution pending here. But we submit, in any event, that the extension should not be accomplished indirectly, in a case where the state affected is not a party and has not had an opportunity either to consider the problem for itself or to defend the judgment its policy may dictate.

I. Under the decisions of this Court, the suppression of evidence illegally seized by federal officers has applied as a rule of evidence only for federal proceedings

A. The rule of suppression, judicial in origin, is not dictated by the Fourth or Fourteenth Amendment

In his first point (Br. 9–24), petitioner seeks to resolve what he treats as the "issue squarely tendered" (Br. 9) with the contention that the Fourth Amendment necessarily bars the admission in a state court of the evidence involved. The argument collides with two propositions announced in the recent decisions of this Court. First, although a right of privacy like that of the Fourth Amendment is conferred against the

states by the Fourteenth, the states are not required to exclude illegally seized evidence in their judicial proceedings. *Wolf* v. *Colorado*, 338 U. S. 25; *Salsburg* v. *Maryland*, 346 U. S. 545; *Irvine* v. *California*, 347 U. S. 128; see also *Stefanelli* v. *Minard*, 342 U. S. 117; *Schwartz* v. *Texas*, 344 U. S. 199. Second, as the Court indicated in the *Wolf* case, the federal rule of suppression is judicial in its origin, may well be subject to amendment by Congress, and is not a necessary corollary of the Fourth Amendment.

Thus, the majority opinion in *Wolf* states with respect to the federal rule (338 U. S. at 28):

> This ruling was made for the first time in 1914. It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication.[1]

And Mr. Justice Black, in his concurring opinion, said (*id.* at 39–40):

> "* * * I agree with the conclusion of the Court that the Fourth Amendment's prohi-

[1] The Court also said (338 U. S. at 33):

"* * * And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the *Weeks* doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own. * * *"

bition of "unreasonable searches and seizures" is enforceable against the states. Consequently, I should be for reversal of this case if I thought the Fourth Amendment not only prohibited "unreasonable searches and seizures" but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.

The implications of the *Wolf* case were followed in *Irvine* v. *California*, 347 U. S. 128, where the inapplicability of the rule of suppression in state court proceedings was reaffirmed despite a gross violation of the right of privacy. Mr. Justice Jackson's opinion reiterated that the security of privacy is embodied in the Fourteenth Amendment, but, as in *Wolf*, declined to make "subsidiary procedural and evidentiary doctrines developed by the federal courts" applicable to the states. 347 U. S. at 132.

The rationale of these decisions is that, while unreasonable searches and seizures are proscribed by the Fourteenth as well as the Fourth Amendment, the penalty for an illegal search is not there prescribed inescapably. Accordingly, so long as a state does not affirmatively sanction illegal searches and seizures, it is free to decide for itself the means by which it will enforce the right of

privacy. *Salsburg* v. *Maryland*, 346 U. S. 545, 554.

Since this much is clear, the state cases cited by petitioner (Br. 23–24), dealing with the admissibility of evidence illegally seized by federal officers, furnish little guidance here. The decisions excluding such evidence stem from states which have adopted for themselves the rule of suppression announced for the federal courts in *Weeks* v. *United States*, 232 U. S. 383. The contrary decisions admitting such evidence come from states which have rejected the rule. (See the summary of state law with relation to the *Weeks* rule in the Appendix to the opinion of the Court in *Wolf* v. *Colorado*, 338 U. S. 25, 33–38.) Both groups of cases, like the decisions of this Court, leave clear our first proposition—that neither the Fourth nor the Fourteenth Amendment, in and of itself, *requires* the rule of suppression for which petitioner contends.

B. Rule 41 (e) of the Federal Rules of Criminal Procedure does not require that evidence wrongfully seized by a federal officer be suppressed by the federal court to prevent its use in a state court

There can be little doubt that Congress—implementing the Fourth and the Fourteenth Amendments and exercising its power of control over federal officers—could provide, if it saw fit, that evidence illegally seized by *federal* officers should be suppressed for all purposes, in state as well as federal courts. Compare *Adams* v. *Maryland*, 347 U. S. 179, which held that former 18 U. S. C. 3486, prohibiting the use of testimony given by a witness in a congressional inquiry "as evidence in any criminal proceeding against him in any court," applied to state as well as federal courts.

There is, however, no statute giving such effect to an illegal search by federal officers. The only expression of the federal rule of suppression which may be said to be sanctioned by statute is Rule 41 (e) of the Federal Rules of Criminal Procedure. These rules, promulgated pursuant to the authority contained in 18 U. S. C. 3771 and 3772, which do not authorize the making of rules for state courts, are entitled "Rules of Criminal Procedure for the District Courts of the United States." Rule 1, which defines the scope of the rules, provides that they shall "govern the procedure in the courts of the United States and before United

States commissioners in all criminal proceedings," with the exceptions stated in Rule 54. Plainly, these are rules for the federal courts and do not extend beyond the federal courts. The sentence in Rule 41 (e) that "If the motion is granted the property * * * shall not be admissible in evidence at any hearing or trial" cannot be read in isolation from the unambiguous provisions confining all the rules to federal proceedings. As this Court said in *Schwartz* v. *Texas*, 344 U. S. 199, 202–203, in holding that evidence secured in violation of Section 605 of the Federal Communications Act (48 Stat. 1103, 47 U. S. C. 605) could be admitted in a state court:

> It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

Surely, the presumption is not to be indulged where Congress has expressly negated it.[5]

We submit, then, that Rule 41 (e) neither requires nor authorizes suppression of federally seized evidence to prevent its use in state proceedings.[6] Petitioner's contrary view (Br. 34–36)

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[5] It should be noted, in passing, that the *Schwartz* case was before this Court on review of a state criminal conviction.

[6] Under Rule 41 (e), the court has no right to compel return of the physical contraband property to petitioner. See *supra*, p. 10, fn. 3. It can, by virtue of that Rule and by virtue of the judicial power to make rules of evidence,

rests upon a failure to acknowledge the clear limitations of the federal rules and a consequent misreading of the decision in *Adams* v. *Maryland*, 347 U. S. 179.

It does not follow, however, that the inadequacy of Rule 41 (e) as a basis precludes the relief petitioner seeks. There is before the federal court an individual alleging violation of a federal constitutional right by a federal officer, claiming that the remedy afforded him by the state court will not be adequate to protect his federal rights. Such allegations appear sufficient to invoke the equitable jurisdiction of the court. Cf. *Bell* v.

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control the disposition of the property without regard to its physical transfer, insofar as the use of such property affects federal judicial proceedings. But nothing in Rule 41 (e) gives it power to control the disposition of the property in other respects. The summary power of the federal courts over improperly seized evidence has been based on the principle that the court may reach forward to control presentation of evidence in a case which may come before it. *In re Fried*, 161 F. 2d 453, 458 (C. A. 2); see also *Foley* v. *United States*, 64 F. 2d 1, 3 (C. A. 5), certiorari denied, 289 U. S. 762. It is on this basis that cases in which the summary power has been exercised can be explained. *Go-Bart Co.* v. *United States*, 282 U. S. 344; *Centracchio* v. *Garrity*, 198 F. 2d 382 (C. A. 1), certiorari denied, 344 U. S. 866; *Raffaele* v. *Granger*, 196 F. 2d 620 (C. A. 3). That rationale would seem to preclude extension of the summary power beyond the point necessary to control of federal judicial action. Particularly is this so in the instant case where, at the time petitioner sought the relief presently at issue, he had already had the evidence suppressed as to federal courts and the indictment based on that evidence had already been dismissed.

Hood, 327 U. S. 678, 684, where the Court held that allegations in an action for damages that federal officers had invaded Fourth Amendment rights was sufficient to confer jurisdiction on the district court. The Court said:

> where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.

See, also, *Douglas* v. *City of Jeannette,* 319 U. S. 157, 161–162.

In short, the effort in this portion of our argument has been merely to correct what we believe to be a misreading of Rule 41 (e). We assume, nevertheless, that there is jurisdiction to make the order of suppression for which petitioner has contended. On this assumption, our ultimate arguments against the granting of such relief are considerations of policy, not of power. Cf. *Stefanelli* v. *Minard,* 342 U. S. 117, 120.

C. The federal rule of suppression has been limited to federal proceedings and, even there, has not been expansively applied

To a large extent, petitioner's argument (see Br. 9–24) strives for the conclusion that evidence illegally seized by federal officers would render invalid a state conviction following a trial in which such evidence had been received. We urge below (pp. 29–30) that this conclusion would militate strongly against, not for, the action of a fed-

eral court to prevent the state court from considering the evidence and determining for itself in the first instance whether it should be used. Here, agreeing with the petitioner (Br. 10) that "the precise point at issue" is a new one, we consider the precedents which bear upon the use in state courts of evidence illegally seized by federal officers. Our conclusions are that that issue is a close one; that the federal rule of suppression has been kept within bounds marked, not by pure logic, but by the fact that this is an area of conflicting and delicately balanced judgments of policy; and that the counsel of restraint which has characterized the cases casts doubt upon the propriety of the extension for which petitioner contends.

Urging that a federal court should undo the effects of an unlawful federal search to the fullest extent possible, even beyond the federal courts, petitioner relies upon the general language in *Silverthorne* v. *United States*, 251 U. S. 385, 392: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." But the familiar admonition to read broad language in the context of the facts to which it applies is highly appropriate here. In *Silverthorne*, the Federal Government, for purposes of federal proceedings before a federal grand jury, was endeavoring to subpoena documents of which

it had previously obtained knowledge through an illegal federal search. What the Court actually held was that this attempt to circumvent the *Weeks* rule was improper, and it was for this conclusion that the opinion observed that evidence unlawfully acquired "shall not be used at all," *i. e.* by federal officials at any stage in the performance of their federal functions related to the courts.

It remains clear that the rule of suppression has never been as broad as the literal terms of this generalization. Thus, the rule may be invoked only by one whose constitutional rights of privacy have been violated, and evidence unlawfully seized may be used against one who lacks this standing. *Agnello* v. *United States,* 269 U. S. 20, 35; *Connolly* v. *Medalie,* 58 F. 2d 629, 630 (C. A. 2); *Gibson* v. *United States,* 149 F. 2d 381, 384 (C. A. D. C.), certiorari denied *sub. nom. O'Kelly* v. *United States,* 326 U. S. 724; see *Goldstein* v. *United States,* 316 U. S. 114, 121; cf. *United States* v. *Jeffers,* 342 U. S. 48, 54. Similarly, only last year the Court rejected as a "perversion of the Fourth Amendment" an extension which would have permitted a defendant to give perjurious testimony and to prevent the demonstration of its falsity on the ground that the evidence supplying the demonstration had been unlawfully obtained (*Walder* v. *United States,* 347 U. S. 62, 65)—although, here again, the literal statement that such evidence "shall not be used

at all" would require a contrary result. And, of course, the cases, like *Wolf* v. *Colorado*, allowing the states to convict on evidence unlawfully seized represent a substantial limitation, particularly weighty in this case, upon the generalization petitioner invokes.

What the cases show, in short, is that the federal courts, for the purposes of federal proceedings, have enforced the rule of suppression in a refusal to give judicial sanction to the use of equivocal methods by the government of which they are a part. *Byars* v. *United States*, 273 U. S. 28, 33; and see the dissenting opinion of Mr. Justice Holmes in *Olmstead* v. *United States*, 277 U. S. 438, 469–471. The rule has never been and cannot be a complete vindication of the rights of privacy. As was pointed out in *Irvine* v. *California*, 347 U. S. at 136, the rule "does nothing to protect innocent persons who are the victims of illegal but fruitless searches." And even within the confines of federal proceedings, the rights of privacy have not been enforced by suppression in every case of proffered evidence obtained by an unreasonable search. Thus, in addition to the limitations already noted, it was held in *Weeks* v. *United States*, 232 U. S. 383, 398, the case in which the rule originated, and assumed in *Byars* v. *United States*, 273 U. S. 28, 33, that evidence illegally seized by state officers could be used in the federal courts. Since both of these decisions were predicated on the assump-

tion that the prohibition against unreasonable searches and seizures was inapplicable to the states, their rationale is no longer wholly acceptable. But the actual result, that the rule of suppression applies only to illegal acts of federal officers, was apparently deemed sound as recently as *Irvine* v. *California*, 347 U. S. 128, 136, though it was then clear that comparable conduct of state officers was equally banned by the Constitution. And see *Lustig* v. *United States*, 338 U. S. 74.

Against this background, we confront here a situation where the forces which have shaped both the federal rule and the refusal to extend it to the states are tensely balanced. On the one hand, the ultimate relief petitioner seeks is the exclusion of illegal evidence from a state court and is in this sense a modification of *Wolf* v. *Colorado*. On the other hand, the unlawful seizure was made by a federal officer, and to the extent that the federal rule is regarded as a device for disciplining federal law enforcement officers, its logic might be extended to these circumstances.

But because the result would clearly be an extension, necessarily treading upon the states, there are imposing considerations against it. In the first place, the Court has characteristically kept within narrowly defined self-imposed limitations in its use of rules of evidence as disciplinary devices against federal law enforcement

officers. In another context, in *United States* v. *Mitchell*, 322 U. S. 65, 70-71, holding that illegal conduct by police officers did not vitiate a valid confession previously given, the Court said:

> * * * [The Court's] duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct.

While the suppression in state courts of evidence illegally procured by federal officers would undoubtedly have some disciplinary and deterrent effects on federal personnel (as does the rule considered in *United States* v. *Mitchell, supra*), similar judgments on the proper role of the federal judiciary counsel against the decidedly "indirect mode of disciplining misconduct" championed by petitioner.

A further, but not unrelated, argument against expanding the rule of suppression, particularly where the expansion will effect a restriction upon the states, is the fact that this remedy is not "an essential ingredient of the right." *Wolf* v. *Colorado*, 338 U. S. 25, 29. Recognizing in *Wolf* "that in fact most of the English-speaking world does not regard as vital" to protection of the right of privacy the exclusion of evidence obtained in violation of the right (*ibid.*), the Court there left the states free to adopt or reject this remedy for themselves as a matter within "an allowable range of judgment on issues not sus-

ceptible of quantitative solution." *Id.* at 28. The ultimate relief petitioner seeks would necessarily restrict that "range of judgment," and thus would fail to jibe with this rationale of the *Wolf* decision. Going beyond the rule of suppression as an exercise of power "to exclude illegally obtained evidence in *federal* trials" (*Irvine* v. *California*, 347 U. S. 128, 134—emphasis added), it would command for state trials a still debated restriction evolved as "a matter of judicial implication." *Wolf* v. *Colorado*, *supra*, at 28.[7]

[7] The solution of the problem presented is not aided by petitioner's attempt (Br. 28–31) to inject the Fifth Amendment into the discussion. While the Court has recognized an interrelationship between the Fifth and the Fourth Amendments, the decisions which do so deal with the situation where the search, actual or constructive, results in the taking of *evidence*, innocuous in itself but serving to help prove a crime (*e. g.*, a diary or other papers), as distinguished from contraband or fruits or instrumentalities of the crime. This appears clearly from the leading case in this field, *Boyd* v. *United States*, 116 U. S. 616, and also from *Gouled* v. *United States*, 255 U. S. 298, on which petitioner relies. The Fifth Amendment comes into play in such cases because the evidence is such that it may not be used even though seized under a valid warrant. What was involved in the search in the instant case, however, was contraband, not evidentiary materials. And certainly if the narcotics agent were allowed to testify as to what he saw when he was executing the invalid warrant, there would be no violation of the privilege against self-incrimination, whatever else might be involved. Thus, the question here is purely and simply the extent of redress to be afforded for a search invalid under federal law. The privilege against self-incrimination plays no part in the answer.

Weighing the considerations outlined above, we suggest that the balance may point against petitioner's broad contention that a state cannot now constitutionally receive evidence illegally obtained by a federal officer. But the very formulation of the problem reflects the obvious point that its impact is primarily upon the states rather than the Federal Government as such. For federal prosecutions, the rule of exclusion is unquestioned, and the evidence here involved, found to have been obtained with a warrant invalid under federal law, is unusable. What matters now is only the state prosecution to the defeat of which petitioner's effort is addressed.

In these circumstances, our major argument goes not to the merits of the troublesome state exclusion problem, but to the impropriety of the effort to resolve the problem in a federal court in the present posture of this case. Before it is decided whether a state may use the evidence in question, we think the state should have an opportunity to consider the problem for itself and to be heard if its decision is for admissibility. We turn to a fuller statement of this view.

II. The application for relief is premature and seeks an unjustified intrusion by a federal district court upon state criminal proceedings

Whether petitioner is right or wrong in his substantive contention that the state may not constitutionally use evidence illegally obtained by a federal officer, there is no occasion for the federal

intervention he seeks in advance of the state's action. If he is right, the state should adopt his view or be corrected by this Court in the ordinary course of review. If he is wrong, the only basis for relief in this action would be a holding that the federal court must grant a motion to suppress if it is brought soon enough, but that there is no remedy where the state has obtained and used the evidence before such a motion is made. This, we submit, would be an unequal rule, creating more frictions and injustices than it would purport to solve. Finally, while we can hypothesize ultimate solutions on the merits, the fact is that the character of the problem calls for full exploration of the matters of fact and policy which remain to be examined by the state for itself. Whatever the final answers are to be, they should follow, not precede, consideration by and representation of the state, the criminal proceedings of which are directly affected.

A. If the Constitution barred use of the evidence by the state court, there would be no reason for the federal court to intervene in this case

If petitioner is correct in arguing that the state court must exclude the evidence, it cannot be assumed in advance that the state court will violate this rule. Thus, on petitioner's own hypothesis, the settled principles that courts of equity do not ordinarily enjoin criminal prosecutions and that federal courts will exercise their discretionary equity power with due regard for the inde-

pendence of state governments would render inappropriate any action by federal courts to control beforehand rulings on evidence in a state criminal proceeding. See *Stefanelli* v. *Minard*, 342 U. S. 117, 120; *Douglas* v. *City of Jeannette*, 319 U. S. 157, 163; *Watson* v. *Buck*, 313 U. S. 387, 400; *Beal* v. *Missouri Pacific Railroad*, 312 U. S. 45, 49; *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, 500–501. Since the remedy of exclusion in the state court would be exactly the same as the remedy petitioner seeks in the federal court, there would be no occasion for granting injunctive relief directed against the proceedings in the state court. Cf. *Douglas* v. *City of Jeannette*, 319 U. S. 157, 165.

B. If the state court is free to receive the evidence, the federal court should not suppress it

To a large extent, the considerations which led this Court in *Stefanelli* v. *Minard*, 342 U. S. 117, to refuse an injunction against use in state courts of evidence illegally seized by state officers apply to this case as well. It is true here, as it was there, that the governing considerations "touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States." 342 U. S. at 120. Such interference should not be allowed except to prevent irreparable injury.

Douglas v. *City of Jeannette*, 319 U. S. 157, 163. And if the prospect that the state in *Stefanelli* might use unlawfully seized evidence (see 342 U. S. at 122) did not constitute irreparable injury, it is difficult to find here any basis for claiming such injury because the unlawful seizure was by a federal rather than a state officer. In principle as well as in its literal terms, that decision reaches this case with its holding (342 U. S. at 120) "that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure."

Petitioner argues (Br. 32–33) that this case is wholly different from *Stefanelli* because the seizure in question was by federal rather than state officers and "the evidence in question is here in the custody of federal law * * *." Passing the question whether this concept of federal "custody" means more than that the federal court has *power* to act—a point we have conceded (*supra*, pp. 20–21) and which was assumed for the sake of decision in *Stefanelli*—the argument suggests a possibility which should be considered and, in our view, rejected. The suggestion is that suppression should follow from the federal custody alone ("federal custody" here meaning, in fact, custody by federal law enforcement officers). We have already shown (*supra*, pp. 29–30) why such action would be premature and unnecessary

if the states themselves were required to exclude the evidence. Here, on the premise that state exclusion is not required, it remains to note that suppression by the federal court would likewise be improper.

Since, as we have suggested (*supra*, pp. 24, 25–26), the *Weeks* doctrine is not primarily a general disciplinary device, the federal court should not be moved to intervene by an administrative purpose to deter or discipline erring federal officers. And it is plain that the district court should not attempt to supervise or impose its will on the state tribunal simply because a "federal factor" lurks in the case (cf. *Stefanelli* v. *Minard*, *supra*.) Moreover, petitioner's position would lead to capricious results. Under the suggested rule, nothing would prevent a state from using the type of evidence in question if it was obtained before there was a federal order of suppression. Exclusion would depend wholly on neither federal nor state law, but on which law was invoked first. Results in particular cases would be determined by the time when the fruits of unlawful federal searches were turned over to state prosecutors. The states allowing the use of such evidence would be encouraged to race against and evade a federal power of suppression based only on federal custody.

If the states are to be denied the use of such evidence, the rule should apply directly and uniformly. It should apply to preclude conviction in

every case, not merely to defeat prosecution in some cases. And if this is to be the law, there is no ground for the present action, as we have already pointed out (*supra*, pp. 29–30).

C. The state's action may alter or eliminate problems presented by premature federal intervention

Our argument thus far that this action is premature has proceeded from the viewpoint of the possible alternative conclusions on the merits which might be reached in the present posture of the case. But this approach fails to account for the point that the state decision petitioner seeks to preclude may itself have an important bearing on the nature of the federal problem.

For example, it is potentially significant, at least from the state's standpoint, that this is not a case where the violation of privacy was flagrant and unquestionable. There was a warrant, but one which the federal court found to be based upon an insufficient affidavit. Since the affidavit is not in the record and since the conclusion that it was deficient was not appealable, there is no basis here for reconsidering the exact ground for holding the search unlawful. It appears, however, that the defect lay in the fact that the affidavit on which the warrant issued was not made by a person having personal knowledge of the facts (see R. 4). This is a flaw for federal purposes which the State of New Mexico, for its purposes, could hold insufficient to nullify the war-

rant. While we have found no New Mexico decisions on the subject, not all states insist that the affidavit be on personal knowledge. See, *e. g.*, *Allen* v. *State*, 178 Md. 269; *Commonwealth* v. *Loesel*, 155 Pa. Sup. 461; *Gallimore* v. *State*, 173 Tenn. 178. And a ruling by New Mexico that, for its purposes, the affidavit was sufficient to justify the search could not be said to violate due process. Cf. *Tonje* v. *People of Puerto Rico*, 187 F. 2d 1020 (C. A. 1).

To be sure, the question of New Mexico law could not be decisive in passing judgment on a federal search. The search remains invalid for federal proceedings. Nevertheless, the circumstance that the particular search in this case appears to have been one on the propriety of which opinions could reasonably differ points up the undesirability of federal intervention at this stage. A ruling by New Mexico that the fruits of any unlawful federal search are admissible in its courts might well present a different problem from a decision holding merely that the evidence here could be received because the search through which it was obtained was not unreasonable by New Mexican standards. If, as we have argued, extension of the federal rule to this situation is at best debatable, decision should at least await concrete development of the problem as it actually arises in and is resolved by the state affected.

Moreover, it is by no means certain now that the state's action will ultimately present any basis

at all for federal action. Although New Mexico has thus far been unwilling to adopt the *Weeks* rule,[8] this is an area of flux in which, as the Court knows, the positions of the states have not remained constant. Thus, in April of this year, the California Supreme Court, overruling a long line of prior cases, held that evidence obtained by an illegal search and seizure would not be received. *People v. Cahan*, 44 A. C. 461. While New Mexico may be unwilling to adopt this broad view, it may decide, more narrowly, to adopt the *Weeks* rule for cases in which the illegal evidence was federally procured. New Mexico should have an opportunity to decide the problem for itself. And this wholly apart from the point, already considered, that if petitioner is correct in arguing that New Mexico *must* decide to exclude the evidence in this case, there is no reason for federal intervention in advance to enforce this result.

The federal courts should not undertake to decide a difficult problem of federal-state relationship and should not interfere with a state court proceeding already begun unless such a course of action is deemed absolutely necessary. No such necessity has been shown here. Whatever the rule ought to be, it should first be presented to the state court for decision.

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[8] *State* v. *Dillon*, 34 N. M. 366; *Breithaupt* v. *Abram*, 58 N. M. 385.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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